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(1) Supreme Court, U.S.
FILED

No. 101301 APR 20 2011

IN THE

SUPREME COURT OF THE UNITED STATES

HARRISTON L. BASS, JR., Petitioner
-vs.-
THE STATE OF NEVADA, Respondent

On Petition for Writ of Certiorari
To The Supreme Court of the State of Nevada

PETITION FOR WRIT OF CERTIORARI

R. PAUL SORENSON
513 South Sixth Street
Las Vegas, Nevada 89101
(702) 384-9831 or (702) 510-6346
ALAN R. JOHNS
7331 W. Charleston Blvd., Suite 100
Las Vegas, Nevada 89101
(702)258-4433
Counsel of Record

QUESTIONS PRESENTED FOR REVIEW

1. Was Doctor Bass denied his right to effective assistance of counsel upon being forced to trial when his attorney was admittedly unprepared? The Nevada Courts have refused to address or consider his constitutional right to effective assistance of counsel in relevant post-trial motions or on direct appeal.

2. Was the Nevada statutory scheme pursuant to which Dr. Bass was prosecuted and convicted of murder unconstitutionally vague and indefinite?

3. Was Dr. Bass' conviction based upon the introduction and advocacy of false evidence?

(a) The State has not denied that the evidence in question was false; the State is apparently denying a *Brady* violation premised upon the suggestion that Petitioner should have known he was being convicted on false evidence.

(b) The prosecutor committed gross legal and ethical misconduct by introducing false evidence, arguing its truthfulness, and failing to correct its falsehood.

LIST OF PARTIES TO PROCEEDINGS

All parties appear in the caption of the case on the cover page. Nevada Attorney General's Office has represented the State of Nevada at all stages of the criminal proceedings in question (including jury trial and direct appeal).

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STATEMENT OF BASIS OF JURISDICTION

The Order of Affirmance sought to be reviewed was entered on May 18th, 2010 and is included in the Appendix.

Petitioner timely filed a Motion for Rehearing of said Order of Affirmance which was denied September 28th, 2010. Dr. Bass next filed a Petition for En Banc Reconsideration. On November 24th, 2010 the Nevada Supreme Court entered an Order Directing the State to Answer the Petition for En Banc Reconsideration. Said Order directed that the Answer be limited to the issue of "whether the conviction was based upon false evidence". Respondent's Answer was electronically filed on December 9th, 2010. On January 20th, 2011, the Court denied *en banc* reconsideration.

On February 4th, 2011 Dr. Bass submitted a Motion for Rehearing of the Order Denying En Banc Reconsideration which the Nevada Supreme Court Clerk rejected as not authorized. Petitioner then filed a Motion for Leave to File a Response to Respondent's Answer to Petition for En Banc Reconsideration, and, if Granted, for Related Relief. This Motion was denied on February 11th, 2011. The Nevada Supreme Court's Remittitur was dated February 14th, 2011.

For purposes of calculating the 90 days for filing this Petition pursuant to Supreme Court Rule 13 (1) and (3) the date the *en banc* consideration was denied (January 20th, 2011) is applicable Petitioner's subsequent filings or attempts to file may arguably extend that time

frame; however, additional time is not considered necessary.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner's second (vague-statute) and third (false evidence) questions to this Court primarily involve due process considerations pursuant to the V and XIV Amendments of the United States Constitution. Petitioner's first question (unprepared/ineffective counsel) also involves the VI Amendment of the United States Constitution. Article I § 8 of the Nevada Constitution includes the right to counsel and due process.

STATEMENT OF THE CASE

About Petitioner

Dr. Harriston Lee Bass ("Bass" or "Petitioner") is an African/American and was born in Chicago, Illinois July 28th, 1954. He attended and graduated medical school at Howard University in Washington D.C. where he also interned in surgery. He returned to Chicago completing his residence at Mt. Sinai and ran the Emergency Room at St. Anthony. He came to Las Vegas, Nevada in the mid-80s and practiced at Nellis Air Force Base. Dr. Bass remained in Clark County, Nevada and has practiced medicine since that time.

Dr. Bass' board certification was in general surgery. His transition to a sole practitioner with emphasis on house calls afforded him the opportunity to control his own business and schedule and was consistent with his preference to have maximum personal patient contact. In 1999 Dr. Bass incorporated DOCS On Call, Inc. and advertised as a house call doctor.

Dr. Harriston Bass is religious, principled, and conscientious in his lifestyle and medical practice. He

worked hard to support his family (wife and daughter) and to minimize the expense and suffering of his patients. During his lifetime he was never charged, arrested, or convicted of any offense That ended on December 20th, 2006 when he became the test case for a zealous prosecutor pursuant to a novel interpretation of a previously unenforced statutory scheme. Dr Bass' medical license is revoked, his assets are gone, and he has been in custody for three years. He is still confident that justice will prevail!

Relevant Facts and Case Status

Note: The record on appeal before the Nevada Supreme Court was extensive (14 volumes) and while any pertinent portions are readily available, said record has not been specifically cited in Petitioner's factual statements.

On October 6th, 2005 Amanda Burney a recently hired investigator with the Clark County Coroner's Office was called to investigate the body and death scene of one Gina Micali After examining the body, she inspected the surrounding area and located several prescription pill bottles – two for Imitrex and one for hydrocodone. She also found a medical report from Dr. Harriston Bass dated October 4th. She contacted Dr. Bass by phone who confirmed that he had seen Micali on October 4th. Ms. Burney took photographs of the scene including the pill bottles. She counted the pills in the hydrocodone bottle, flushed the pills down the toilet, and then destroyed the bottles. Ms. Burney concluded this was an accidental death and filed her report which included a medication receipt indicating that the destroyed hydrocodone bottle was given Micali on October 4th (one or two days before her death) and was missing 51 pills.

Several days later Micali's mother and brother Joey visited Gina's residence. At that time, Joey located a number of prescription drug bottles in a kitchen cabinet. Since he didn't want to alarm the mother about the presence of drugs, he returned later to remove them and placed them in a safe at his residence. Subsequently, these were turned over to the office of Attorney Edward M. Bernstein who was representing Gina's mother and estate in a personal injury (wrongful death) claim against Dr. Bass and Allscripts, the manufacturer, packager, and distributor of prescription medications (including hydrocodone). Much of the prescription medication Dr. Bass provided his house-call patients was obtained from Allscripts.

March/April, 2006. According to the investigative division of the State Department of Public Safety, the Clark County Coroner's Office contacted them regarding a suicide of Jamie Petchie. Mr. Petchie had been a prior patient of Dr. Bass. The State's primary investigator was Jennifer Reubart.

June 1st, 2006. The investigative division obtained a search warrant for Dr. Bass' residence, vehicle, and other office/storage locations. His patient information, prescription records, receipts, and all his money were seized. The affidavit in support of the search warrant was sealed and not obtained by Dr. Bass until after a Court Order on **January 3, 2008**.

August 15th, 2006. Pursuant to a subpoena, the investigative division obtained eight pill bottles from Attorney Edward M. Bernstein's office. The State subpoenaed only the Allscripts bottles in Attorney Bernstein's possession.

September 26th, 2006. The Nevada Supreme Court reversed and remanded the District Court's Summary Judgment in an insurance case filed by Dr Bass against the Doctors Company. The reversed judge was Jackie Glass who would soon be assigned to his criminal case

October 2nd, 2006. Attorney Bernstein's office filed suit against Dr Bass, Allscripts, and Walgreens alleging responsibility for Gina Micali's death .

December 20th, 2006. Dr Bass was arrested pursuant to a complaint filed in Justice Court, Clark County, Nevada. An Amended Complaint containing 25 counts including the murder of Gina Micali was filed on December 22nd, 2006 A preliminary hearing took place **January 5th, 2007**. The Justice of the Peace took the evidence under advisement.

January 19th, 2007. An indictment was returned containing 38 counts all alleging the sale of controlled substance . . . 17 times to one Alvin Vetter, 16 times to one Gene Papandrea, and 5 times to one Chad Worthen.

January 22nd, 2007. An information was filed pursuant to the JP's bind-over containing 18 counts. The information case no.: 229628 and the indictment case no.: C229660) were consolidated on **April 19th, 2007.**

February 25th, 2008-March 5th, 2008. The jury trial was conducted resulting in verdicts of guilty as to all 56 counts. At the beginning of trial Dr. Bass' counsel requested a continuance and advised the Court that he was unprepared The judge stated he would never be prepared and proceeded.

April 17th, 2008. A meeting was held at Attorney Edward M. Bernstein's office to release the contents of

State's proposed trial exhibit back to Bernstein's office. Attorney R. Paul Sorenson attended in Dr. Bass' behalf and had the meeting reported.

April 22nd, 2008. Dr. Bass was sentenced, and the Judgment of Conviction filed May 6th, 2008. On **June 5th, 2008** Dr. Bass' Notice of Appeal to the Nevada Supreme Court was filed.

September 23rd, 2008. Dr. Bass filed Post-Conviction Motions for a New Trial or Dismissal Based Upon Newly Discovered Evidence before the trial court. These motions were set for hearing October 7th, 2008.

October 7th, 2008. First hearing. Hearing was continued until October 14th, 2008 to allow the State to file an Opposition on the merits. At the second hearing Dr. Bass' Motion(s) were orally denied.

December 6th, 2008. Dr. Bass' counsel received by mail an unfiled copy of the Order from the October 14th hearing. Interestingly the Order was signed by Judge Glass on November 9th, 2008.

December 22nd, 2008. Dr. Bass filed his Notice of Appeal and Case Appeal Statement. This appeal was consolidated with the earlier (June 5th, 2008) appeal.
The dates and relevant orders of the Nevada Supreme Court are set forth in Petitioner's Statement of the Basis for Jurisdiction and included in the Appendix.

Concisely as to the False Evidence

At the **January 5th, 2007** preliminary hearing, a paper bag purportedly containing the items delivered to Attorney Bernstein was shown to Reubart. It was not opened, the contents displayed, or allowed in evidence.. The bag was returned to Reubart. At jury trial, over a year later, it was identified as State's proposed Exhibit 12. The paper bag was not opened at trial, the contents not

identified, and it was not admitted in evidence. After an un-reported bench conference, the effort to introduce it was abandoned. The bag remained in the custody of the court clerk until released back to Attorney Bernstein's office on April 17th, 2008

The April 17th meeting at Bernstein's office was precipitated by his Motion to release to his office the contents of Exhibit 12 for use in furtherance of their civil case. At the hearing of this Motion, the release of this evidence was objected to by Dr. Bass primarily because he didn't know the contents or appreciate their significance Fortunately, Attorney R. Paul Sorenson attended the inventory and release of these items and had the foresight to record the proceedings. This was the first time anyone in Dr. Bass' behalf had actually seen and documented these contents. The prescription numbers were clearly identifiable, and it was established beyond question that each and every prescription bottle provide to Gina Micali by Dr Bass on October 4th was contained in proposed Exhibit 12. Therefore Amanda Burney's testimony that the bottle with 51 missing pills which she destroyed was provided Micali on October 4th, 2005 was false.

REASONS THAT THIS COURT SHOULD GRANT CERTIORARI

Understandably the Court must be selective in Its certiorari review. This case is unique, compelling, and deserving of such consideration. Petitioner was a highly qualified and licensed black medical physician who happened to be the first individual selectively chosen for prosecution under the State of Nevada's vague and confusing statutory scheme . Ultimately Dr. Bass' murder conviction was based entirely upon the introduction and advocacy of false evidence. This result is

repugnant to our country's fundamental concept of justice. The process by which this occurred was a combination of constitutional violations.

That the evidence was false is clear and overwhelming. Said false evidence was material and formed the basis for Dr, Bass' murder conviction. The trial judge adopted the false evidence and instructed the jury consistent therewith. The prosecutor argued its truth throughout trial. The unique and compelling aspect of this case is that, even though everyone knew or now knows that the evidence was false, the Nevada Courts have declined to grant relief. Petitioner is still incarcerated.

The prosecutor has argued that (i) defense counsel knew or should have known the evidence was false, and (ii) that even if he urged the jury to accept the false evidence as true, the court's instruction that counsel's statements are not evidence was curative. Both the trial court and the Nevada Supreme Court appear to have adopted the position that Dr. Bass' trial counsel knew or should have known the evidence was false. Both courts declined to address ineffective assistance of counsel on direct appeal.

This is a case where any review of the record leads to the conclusion that Dr. Bass was convicted of murder based on false evidence. At best, the prosecutor didn't know (which is unlikely) that the evidence was false while he was submitting and arguing it. At worst, the prosecutor intentionally failed to disclose (or camouflaged) exculpatory evidence and knowingly introduced and argued the false evidence.

Petitioner is endeavoring to limit his Questions to this Court to constitutional violations which are final and

no longer subject to further exploration or exhaustion at the State level. However, if Nevada's post-conviction scheme for addressing ineffective assistance of counsel is valid, Petitioner may be forced to go back through the State trial court and then appeal again to the Nevada Supreme Court. There is no reason to subject Dr. Bass to this prolonged endeavor and continued incarceration. Neither the false evidence or the Void-For-Vagueness issues are going to change and there is no reason for further evidentiary hearings.

ARGUMENT

QUESTION 1. Was Dr. Bass denied his right to effective assistance of counsel by being forced to trial when his attorney was admittedly unprepared?

At the commencement of trial the following statements and discourse occurred between Dr. Bass' lead counsel and the Court.

"**Mr. Phillips:** Your Honor here's a – a problem that we have. We-over the weeks-the last couple of weeks we've been trying to put together all of my client's records that – the ones that have been returned, but his computer has been erased, various documents have just been thrown together. We've been trying to put everything in order that they were. It's a tremendous heap of papers that we can't get through and we need that to defend-

The Court: Mr. Phillips-

Mr. Phillips: -my client.

The Court: We're going to trial today. We are not putting off this trial again – we have put all [sic] this trial too long and today's the day we're going to trial.

Mr. Phillips: Then I need to state for the record emphatically that we're not prepared to go forward today.

The Court: There has been a consorted [sic]effort by the defense to avoid having this case go to trial. This case is going to trial today.

Mr. Phillips: And I need to make the record that the defense has not made any [--to my knowledge, any concerted effort to not go to trial. we just want to go to trial properly and prepared.

The Court: Mr. Phillips, you'll never be prepared for this trial at the way this has been going. So you've tried to continue this. You've tried to recuse me. You've caused all kinds of delays. today is the day, and I told you this. This has been pending for a significant period of time and today is the day we're going to trial."

Where trial counsel candidly acknowledges that he is unprepared to proceed, it would seem unnecessary to trace his trial performance within recognized effective - assistance standards. See *Strickland v. Washington*, 446 U.S. 668 (1984) and *Kirksey v. State,* 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996). Even the best attorney can't be effective if he's unprepared. The record does bear out Attorney Phillips' representations that he wasn't ready. As just one example at the commencement of Defendant's case the Court took a recess and noted:

"THE COURT: Okay. It's a few minutes before 10:00. We just started testimony.. Mr. Phillips, I'm going to give you ten minutes to get your documents together. If you don't have your documents together, we're going to go, and whatever way they are, they are. But you're wasting my jury's time and I'm getting very, very frustrated. So you need to have it together when we come back.

Your client made an unsolicited statement. It's my job to make sure in this courtroom that that doesn't happen. So my tone with your client, who's been sitting there all weekend, knows better, had to be admonished and it was going to be in front of the jury. Now get your act together so we can proceed with this trial."

The Court has a responsibility to assure that an accused receives effective assistance of counsel Here the judge made no inquiry as to what additional preparation was necessary or how long it might take.

QUESTION 2. Was the Nevada statutory scheme pursuant to which Dr. Bass was prosecuted and convicted of murder unconstitutionally vague and indefinite?

The Void-For-Vagueness Doctrine is well recognized and established.

See *Graynard v. City of Rockford*, 408 U.S. 104, 108-109 (1972):

"It is a basic principle of due process that an enactment is void for vagueness if it's prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of

arbitrary and discriminatory application." (footnotes omitted).

and *Smith v. Goguen*, 415 U.S. 566, 575 (1974):

"We are without authority to cure that defect. Statutory language of such standard less sweep allows policemen, prosecutors, and juries to pursue their personal predilictions. Legislators may not abdicate their responsibilities for setting the standards of the criminal law." (footnotes omitted).

A leading Nevada case discussing this doctrine is *Eaves v. Board of Clark County Commissioners*, 96 Nev. 921, 620 P.2d 1248 (1980) which involved the review of an ordinance prohibiting the conduct of escort services. In determining that said ordinance violates both the Nevada Constitution (Article I, Section § 8) and the United States Constitution Amendment XIV § 1 the Court held:

"The court has consistently held that ordinances like Ordinance No. 595, which prescribe serious penalties, must be strictly construed. Oueilhe v. Loveil, 93 Nev. 111, 113, 560 P.2d 1348 (1977); In re Laiolo, 83 Nev. 186, 188, 426 P.2d 726 (1967).

An ordinance which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning, and differ as to its application, violates the first essential of due process, i.e. the notion of fair notice or waning. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); Note, the Void-For-Vagueness Doctrine in the

Supreme Court, 109 U.Pa. L Rev 67, 68 (1960); *accord* Smith v Goguen, 415 U.S. 566, 572 (1974); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) An ordinance which fails to give persons of ordinary intelligence fair notice whether their contemplated conduct is permitted or forbidden must be declared to be void for vagueness, and thus to deny due process of law. United States v. Harriss, 347 U.S. 612, 617 (1954)" (page 923)

In *Eaves* the Court discusses a number of the scenarios or problems created by vague statutes including:

"Considered in the light of established constitutional principles, these ambiguities in Ordinance No. 595 allow too much unbridled discretion. The imprecision in the language of the ordinance permits, and is likely to encourage, arbitrary and discriminatory enforcement. *Papachrisou, supra*, at 170, Coates v. Cincinnati, 402 U.S. 611, 614 (1971)" (page 924)

Dr. Bass' murder charge was:

"COUNT I

SECOND DEGREE MURDER

(SALE OF A CONTROLLED SUBSTANCE CAUSING DEATH)

(A Category A Felony—NRS 200.010, 200.030 and 453.333)

That the defendant, HARRISTON L. BASS, JR did unlawfully kill a human being which was proximately caused by a controlled substance sold, given, traded or otherwise made available to another person in violation of Nevada Revised Chapter 453 to wit: That from June 2005 through October, 2005, in Clark County, State oNevada,

the defendant, without having a license to dispense prescription drugs containing a controlled substance, sold, gave or otherwise made available prescription drugs containing Hydrocodone, a schedule III controlled substance, to Gina Micali which caused her death on or about October 6, 2005."

The original criminal complaint alleged "malice aforethought" (I-0002) but this language was dropped.

NRS 200.010 defines murder:
Murder is the unlawful killing of a human being.

1. With malice aforethought, either express or implied.

2. Caused by a controlled substance which was sold, given, traded or otherwise made available to a person in violation of chapter 453 of NRS; or

3. Caused by a violation of NRS 453.3325.

The unlawful killing may be effected by any of the various means by which death may be occasioned."

The murder statute refers to a general violation of Chapter 453, but the State's charging document identifies a specific provision of that Chapter NRS 453.333 which provides in pertinent part:

"If the death of a person is proximately caused by controlled substance which was sold, given, traded or otherwise made available to him by another person in violation of this chapter, the person who sold, gave, or traded or otherwise made this substance available to him is guilty of murder." . . . . ." Emphasis added.

The charging document does not set forth another section of Chapter 523 which Dr. Bass allegedly violated. While this is required pursuant to NRS 173.075 (3), one has to look through the constantly changing Uniform Controlled Substance Act and/or the regulations of the pharmacy board to see if there is one. The provision of the above identified statute which has been highlighted "otherwise made available" would clearly include a doctor prescribing said substance. There wasn't and isn't any question but that Dr. Bass was authorized to prescribe the controlled substances at issue. This creates the interesting and important question. If Dr. Bass made available to Gina Micali the same controlled substance through means not in violation of the Chapter and arguably also by means in violation of the Chapter is he guilty of murder? While it would seem an absurd conclusion, this is a reasonable interpretation of the statute. Admittedly the zealous prosecution tried to work its way around this statutory dilemma with causation arguments; however, this effort not only did not rectify the statutory infirmities but resulted in an improper murder conviction.

The Controlled Substance Act Chapter 453 is divided in a number of sections: General Provisions, Schedules, Regulation, Enforcement, Forfeitures, and Offenses and Penalties.

NRS 453 226 is a regulatory provision:

"1. Every practitioner or other person who dispenses any controlled substance within this state or who proposes to engage in the dispensing of any controlled substance within this state shall obtain biennially a registration issued by the board in accordance with its regulations

2. A person registered by the board in accordance with the provisions of NRS 453.011 to 453.552, inclusive, to dispense or conduct research with controlled substances may possess, dispense or conduct research with those substances to the extent authorized by the registration and in conformity with the other provisions of those sections.

3 . . . . .

4. The board may waive the requirement for registration of certain dispensers if it finds it consistent with the public health and safety.

5. A separate registration is required at each principal place of business or professional practice where the applicant dispenses controlled substances.

6. The board may inspect the establishment of a registrant or applicant for registration in accordance with the board's regulations."

Practitioner is defined in NRS 453.126 in pertinent part:

"Practitioner" means:

1. A physician, dentist, veterinarian or podiatric physician who holds a license to practice his profession in this state and is registered pursuant to this chapter." . . . .

The murder charges against Dr. Bass specify two statutes (NRS 453.333 and NRS 200.010) neither of which

define a completed crime This is true since both require a violation of some unidentified provision of Chapter 453.

There are two statutes which might apply:

NRS 453.321 which is included in the Offenses and Penalties section:

"1. Except as authorized by the provisions of NRS 453.011 to 453 552, inclusive, it is unlawful for a person to:
(a) Import, transport, sell, exchange, barter, supply, prescribe, dispense, give away or administer a controlled or counterfeit substance; or
(b) Manufacture or compound a counterfeit substance;
(c) Offer or attempt to do any act set forth in paragraph (a) or (b).

. . . . . .

4. Unless a greater penalty is provided in NRS 453.333 or 453.334, if a person violates subsection 1, and the controlled substance is classified in schedule III, IV, or V, he shall be punished·
(a) For the first offense, for a category C felony as provided in NRS 193.130

. . . . . .

and

NRS 453 232. **Penalty for failure to register.** which is included in the Regulatory section:

A person who dispenses a controlled substance without being registered by the board if required by NRS 453.231 is guilty of a category D felony and shall be punished as provided in NRS 193 130.

. . . . .

Considering the fact that the other 55 counts against Dr. Bass are brought pursuant to NRS 453 232 which is consistent with the Court's instructions, and he was sentenced to a Category C felony, it is clear that the

State selectively picked that statute. However, said statute referring to "any person" does not apply to a licensed medical doctor authorized to prescribe but able to dispense only with the prior authorization of the board. The only "person(s)" that fall into that category are a limited number of people (most specifically physicians). All others are not allowed to apply for registration to dispense. Dr. Bass was therefore charged, convicted, and sentenced under the wrong statute. Whether we mark this up as prosecutorial over-zealousness, judicial errors in rulings and instructions, ineffective assistance of his counsel, or whatever; we still have invalid convictions. While Dr. Bass is presenting this issue within the context of the overall statutory infirmities, even if they didn't exist (or are found not to), he still can't be convicted of a crime (murder) he couldn't commit.

QUESTION 3. Was Dr. Bass' conviction based upon the introduction and advocacy of false evidence?

There is no evidence in the record refuting the Declaration of R. Paul Sorenson, Esq. asserting his belief that he was the first person to inspect the contents of proposed Exhibit 12 in Dr. Bass' behalf . This didn't occur in any prior proceedings; and, Dr. Bass' trial counsel made it clear in his Opening Statement that he hadn't:

"She was prescribed medication. She filled those prescriptions as counsel stated, but nobody ever found them. We don't know where those pills are. We don't know what she was doing with the pills. We don't know if she left them at her mom's house, if she left them at work, if she left them with a friend, if she left them in her car. We don't know that."

What was discovered on April 17th, 2008 was that proposed Exhibit 12 contained hydrocodone bottles bearing prescription numbers BG686647, BG686648, and BG686642.

Dr. Bass' patient record for Gina Micali on October 4th, 2005 establishes that the prescription labels in the right hand side which though difficult to read are:

Hydrocodone, 325 MG/10MG, 100 tablets, Prescription No · BG686647

Hydrocodone, 100 tablets, Prescription No.: BG686642

Hydrocodone, 100 tablets, Prescription No.: BG686648

The Evidence Was Material and Exculpatory

To put the significance of this newly discovered evidence in perspective, the prosecution's entire theory was that the hydrocodone which caused Gina Micali's death was dispensed by Dr. Bass two days earlier. This is clear from the prosecutor's Opening Statement:

"The Clark County Coroner's Office also sent an investigator, Amanda Burney. She walked into the home, and through protocol – there's established protocol – photographed the home checked the body, confirmed that Gina, had died and discovered in the kitchen an All Scripts bottle containing prescription pills. She'll tell you that based on her investigation, she **confirmed** that All Scripts bottle **came from the defendant two days earlier**. (emphasis provided)

and closing:

"And why do you have to consider it? Because look at the proximate cause instruction **Proximate is that cause which is natural** in continuous sequence

unbroken by any other intervening causes that produces the injury and without which the injury would not have occurred. She would not have died if she hadn't take the hydrocodone that was **sold to her by Dr. Bass on October 4, 2005**. And he sold her three bottles. **And you've seen the picture from the coroner investigating that documented a bottle of All Scripts. Can't you draw a reasonable inference that she had taken All Script pills?**

In addition to that, you heard her brother testify that a couple weeks after the funeral he went in and found another three All Script bottles in her hutch in the kitchen, in the drawer. 261 nanograms of Hydrocodone in her system on the 7th. Dr. Bass selling her three bottles on the 5th day of October, Joey Micali going into the house three days after the funeral finding three bottles of All Scripts. She died because of the drugs that he sold her and **that's what I have to show.** And you can infer that circumstantially. **And if you don't apply that rule of law, then you are ignoring the instructions.** And you've seen the picture from the coroner investigator that documented a bottle of All Scripts. **Can't you draw a reasonable inference that she had taken All Script pills?"** (Vol. 7, pp. 78-79, emphasis provided).

As the prosecutor told the jury, he would and did elicit from Amanda Burney a confirmation that the half-filled hydrocodone bottle which she had destroyed was given to Micali by Dr. Bass two days earlier. After showing Ms. Burney State's Exhibit 16 (the coroner's office medication receipt) we had the following questions and answers:

BY MR. HAFEN:

Q. Looking at page 2 of the exhibit, what information does that contain?

A It is a description of the meds that were found at the scene and the quantity that were prescribed and the name of the doctors that prescribed it as well as the dates.

Q And does this log reflect, then, the same drug bottle that's depicted in that picture that I showed you previously?

A. Yes, because the information on the log is always taken from the prescription bottle.

Q. And according to that log on page 2, then, where did you find the bottle?

A. Again, the hydrocodone bottle was found in the kitchen. (VI – 1323-1324) (Emphasis added)

The evidence conclusively establishes that the half-full hydrocodone bottle was not given, dispensed, sold, or provided to Gina Micali two days before her death. This destroys the prosecution's case, and refutes its arguments to the jury. It further renders the jury's verdict inconsistent with the instructions of the Court on elements of the crime, proximate cause, etc. Even if Amanda Burney's testimony was innocently false (mistaken) it cannot be allowed to form the basis for Dr. Bass' conviction.

The Court's murder instruction to the jury read as follows:

" INSTRUCTION NO. 5

In order to find the Defendant Guilty of Second Degree Murder (Sale of a Controlled Substance Causing Death), the State must prove each of the following elements beyond a reasonable doubt:

1. That on or about October 4-6, 2005, in Clark County, Nevada;

2. The Defendant unlawfully;

3. Killed a human being;

4. The death was proximately caused by a controlled substance;

5. The controlled substance was sold, given, traded or otherwise made available to the victim by the defendant;

3. In violation of Nevada Revised Chapter 453."

(Emphasis added) (X-2075)

Disregarding the disjointed paragraph 3 at the end, and the poor syntax of this instruction, it is clear that Paragraph 1. on or about October 4-6, 2005 encompasses not only the killing and death but the date(s) of making available the controlled substance as required in Paragraph 5. The State prepared and proposed this Instruction which is the only one with any dates or time frames relating to the murder charge.

Prosecutorial Misconduct (*Brady* Violations)

The State has never answered the question of when it knew the evidence was false. This despite the Nevada Supreme Court's Order directing a response on the false evidence issue (In Appendix).

A good summary of the Brady issues is in *United States v. Delray Price,* 566 P.3d 900 (9th Cir. May 21st, 2009) which although not establishing new law contains

an excellent discussion of Supreme Court Decisions: (*Brady v. Maryland* 373 U.S. 83 (1963), *Kyles v. Whitley*, 514 U.S. 419 (1995); *Giglio v. United States*, 405 U.S. 150 (1972), and *Napue v. Illinois*, 360 U.S. 264 (1959)) as to the failure to preserve/disclose exculpatory evidence and/or presenting/failing to correct false and misleading testimony and evidence. The Court notes:

"[E]xculpatory evidence cannot be kept out of the hands of the defense just because the prosecutor does not have it, where an investigating agency does. That would undermine *Brady* by allowing the investigating agency to prevent production by keeping a report out of the prosecutor's hands until the agency decided the prosecutor ought to have it. . ." *Blanco*, 392 F.3d at 388 (quoting *United States v. Zuno-Arce*, 44 F.3d 1420, 1427 (9th Cir. 1995)). Moreover, as we have previously held: actual awareness (or lack thereof) of exculpatory evidence in the government's hands, . . is not determinative of the prosecution's disclosure obligations. Rather, the prosecution has a duty to learn of any exculpatory evidence known to others acting on the government's behalf. Because the prosecution is in a unique position to obtain information known to other agents of the government, *it may not be excused from disclosing what it does not know but could have learned. Carriger v. Stewart, 132 f.3D 463, 479-80* (9th Cir. 1997) (*en banc*) (citations omitted) (emphasis added).

CONCLUSION

WHEREFORE Petitioner prays that his Petition for Writ of Certiorari be granted.

Respectfully Submitted

R. Paul Sorenson, Esq.
Nevada Bar No.: 002124
513 S. Sixth Street
Las Vegas, Nevada 89101
(702) 384-9831 or 510-6346
Attorney for Petitioner

Alan R. Johns, Esq.
Nevada Bar No.: 001602
7331 W. Charleston Blvd., #110
Las Vegas, Nevada 89117
(702) 258-4433
Attorney for Petitioner